SEMESTA INSURANCE UNDERWRITING AGENCY SDN BHD *a*

v.

KOPERASI INSURAN MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
STEVE SHIM J
[CIVIL SUIT NO: D5-22-225-1995]
25 FEBRUARY 1999

CIVIL PROCEDURE: *Amendment - Statement of claim - Trial to be heard de novo - Whether amendments bona fide - Whether within character of suit* *c*

This was the defendant's appeal against the decision of the Senior Assistant Registrar allowing the plaintiff's application to amend its statement of claim. The plaintiff had filed the application for amendment while waiting for its suit to be heard *de novo* as the judge hearing it had been transferred to another division of the High Court. *d*

The defendant argued that the amendments sought were not *bona fide* as: (i) they were an attempt to rectify defects that surfaced when the suit was heard earlier; (ii) they were made in the course of trial; and (iii) there was a substantial delay in making them. It was also argued that the proposed amendments had the effect of changing the character of the suit. *e*

Held:

[1] The allegation that there was an attempt by the plaintiff to rectify defects was not accepted. Nor was there justification in the allegation that the amendments were made in the course of the trial as there was an express court order directing that the case be heard *de novo.* This meant that there would be a fresh trial of the action and it was not disputed that the amendments were made prior to this trial. *f*

[1a] The substantial delay in making the amendments was not a ground for disallowing them unless the defendant was prejudiced. No prejudice was established here. The issue of an absence of *bona fide* had no merit whatsoever. *g*

[2] The proposed amendments were substantially to clarify the issues in dispute. They did not change the character of the suit. *h*

[Appeal dismissed.]

i

Case(s) referred to:
Ketteman & Ors v. Hansel Properties Ltd & Ors [1987] 1 AC 189 ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 ***(refd)***

For the plaintiff - Christie Soosay Nathan; M/s Christie Soosay Nathan & Assoc
For the defendant - Cecil Abraham; M/s Satha & Co

Reported by Sherin Kunhibava

JUDGMENT

Steve Shim J:

This is an appeal by the defendant against the decision of the learned Senior Assistant Registrar in allowing with cost the application by the plaintiff to amend its statement of claim as per encl. 89. A brief description of the events leading to this application is illuminating.

On 8 May 1995, the plaintiff commenced this suit against the defendant. The case eventually came up for hearing before Mr. Justice Dato' RK Nathan on 17 May 1996, 27 June 1996 and 4 July 1996, in the course of which 3 witnesses for the plaintiff had given evidence. Before the next hearing date however, the learned judge was transferred to another division of the High Court. The case was then ordered, at the request of all the parties concerned, to be heard *de novo*. Whilst waiting for the case to be heard *de novo*, the plaintiff thereafter on 18 November 1997 filed this application to amend its statement of claim (encl. 89). This, as I said, was heard by the learned Senior Assistant Registrar on 2 December 1997 who allowed the application with cost. Hence this appeal.

The application at encl. 89 has been opposed by the defendant. Essentially the thrust of the defendant's opposition is two-fold, namely (1) that the amendments sought for by the plaintiff are not *bona fide* and (2) that the amendments have the effect of turning the suit from one character into a suit of another and inconsistent character. Let me deal with them separately. At the outset, it is important to bear in mind the relevant legal principles involved. Here, I need merely refer to that part of the judgment of Mohamad Azmi FJ in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 at p. 214 which reads:

> Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of the Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine*). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether

> injustice would or would not result, (1) whether the application is *bona fide* (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character (see *Mallal's Supreme Court Practice* page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the event of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

Clearly therefore what is of fundamental importance is to consider the justice of the case. This appears to encompass a wide range of factors not possible of enumeration. This is what Lord Griffiths has to say in *Ketteman & Ors v. Hansel Properties Ltd & Ors* [1987] 1 AC 189 (HL).

> Whether an amendment should be granted is a matter for the discretion by the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different deface.

It is in the light of the above principles that I now proceed to deal with the issues raised by the defendant. First, as I have said, the defendant has alleged that the amendments are not *bona fide* for the following reasons: (a) that they constitute in effect an attempt by the plaintiff to rectify defects in its statement of claim; defects which have apparently surfaced in the cross-examinations of its witnesses during the course of the trial before Mr. Justice Dato' RK Nathan; (b) that they are made in the course of trial and (c) that there is substantial delay in making the amendments. Let me say that after having carefully and thoroughly examined the notes of evidence as against the pleadings in the statement of claim and the proposed amendments, (a more in-depth exercise than I did when considering the application in encl. 108), I do not accept that there has been an attempt by the plaintiff to rectify defects as alleged by the defendant. Nor do I find any justification in the defendant's allegation that the amendments are made in the course of trial since there is in existence a court order expressly directing that the whole case be heard *de novo*. This in

effect means that there will be a fresh trial of the action. It is not disputed that the said amendments have been made prior to the fresh trial. It has also to be noted that the mere fact there has been a substantial delay in making the amendments is no ground for disallowing the said amendments unless they have resulted in prejudice to the defendant. No prejudice has been established in this case. Indeed there is none. In the circumstances, I do not think that the issue of an absence of *bona fide* has any merit whatsoever.

Secondly, it has been alleged that the amendments have resulted in changing the character of the suit. According to counsel for the defendant, by virtue of the amendments the plaintiff is seeking to alter the capacity in which it has brought the writ, from that of an underwriting agent to that of an insurance agent and consultant and has further introduced new causes of action such as malicious prosecution and libel giving rise to fresh reliefs in the forms of aggravated, punitive and exemplary damages and costs, *etc*. Having taken a closer look at the proposed amendments, I have to say that they are essentially related to the consequences that allegedly flow from a series of events commencing from the setting aside of the judgement in default obtained by the defendant against the plaintiff to the dismissal of the winding-up petition taken up by the defendant against the plaintiff and culminating in the final withdrawal of the court action by the defendant against the plaintiff. Arising from these events, the plaintiff has alleged negligence, malicious prosecution and libel resulting in alleged general damages, punitive and exemplary damages, interests and costs. Quite clearly, the proposed amendments are founded on the same or substantially the same factual bases which have remained intact throughout. In my view, the proposed amendments are to substantially clarify the issues in dispute. In the circumstances, I am unable to accept the proposition that they have precipitated in changing the character of the suit. That has no merit whatsoever.

For the reasons given, I will uphold the decision of the learned Senior Assistant Registrar in allowing the application in encl. 89. Accordingly, I dismiss the appeal with cost.